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## The Legal Quandary of Serving Two Masters—California's Prohibition Against Financially Interested Contracts

By Rahsaan J. Tilford\*

### I. INTRODUCTION

Recent scandals involving public officials at the federal, state, and local level have highlighted the need for continued vigilance against conflicts of interest. It is not uncommon for the media or an informed constituent to expose an alleged conflict. Such allegations can seriously damage or even ruin a career dedicated to serving the public. In this environment of heightened scrutiny, public officials need to be aware of their duties and the legal restrictions imposed on their ability to participate in decisions from which they may conceivably realize a personal benefit.

Simply stated, agents of public entities should avoid participating in the formation of any contract in which they are financially interested. Failure to do so could result in the contract being deemed void, as well as the financially interested official being exposed to criminal penalties, including imprisonment.

### II. PROHIBITED CONTRACTS UNDER GOVERNMENT CODE SECTION 1090

#### A. COMMON LAW ORIGINS

The conflict of interest rules that proscribe financially interested contracts are based in the common law. The common law prohibits public officials from contracting with themselves on grounds of public policy. (*Santa Ana Water Co. v. Town of San*

*Buenaventura* (S.D. Cal. 1895) 65 F. 323, 327.)

The principle underlying the rule is that no individual can faithfully serve two masters at one time where those interests are or may be in conflict. (*Stockton Plumbing & Supply Co. v. Wheeler* (1924) 68 Cal.App. 592, 601.) If an individual acts in a fiduciary capacity as an agent, she is precluded from acting in a way that is adverse to her principal. (*Id.*) Likewise, public officials are agents of the people they represent. As fiduciaries, they must put the interests of their constituencies first and not enter into contracts that will benefit themselves individually.

#### B. PURPOSE OF GOVERNMENT CODE SECTION 1090

California has codified the common law doctrine prohibiting public officials from contracting directly or indirectly with themselves. Government Code section 1090 imposes conflicts of interest restrictions at both the state and local levels on public officers and employees who are involved in negotiating contracts. It is an absolute bar to entering into a contract in which the public officer or employee has a financial interest. Section 1090 provides:

"Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board

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Stephen P. Deitsch  
[Stephen.Deitsch@bbklaw.com](mailto:Stephen.Deitsch@bbklaw.com)

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of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

As used in this article, ‘district’ means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.”

The fundamental goal of section 1090 is to prevent a collision of the divided loyalties that a public official may have between his public duties and his personal economic interests. Section 1090 recognizes, as absolute, that a person cannot serve two masters. (*Thomson v. Call* (1985) 38 Ca1.3d 633, 637.) As one court has stated, “an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.” (*United States v. Mississippi Valley Generating Co.* (1961) 364 U.S. 520, 549.)

Section 1090, therefore, is not concerned with what actually occurred, but with what might have occurred. (*Thomson v. Call*, *supra*, 38 Ca1.3d at 637.) It seeks to ensure a public official’s undivided and uncompromised allegiance by “remov[ing] or limit[ing] the possibility of any personal influence, either directly or indirectly which might bear on an official’s decision . . .” (*Stigall v. City of Taft* (1962) 58 Ca1.2d 565, 569, italics added.) Thus, a court’s review of an alleged section 1090 violation is not limited to instances of actual fraud, dishonesty, unfairness or loss to the governmental entity. Rather, criminal responsibility is assessed without regard to whether the contract in question is fair or oppressive. (*People v. Darby* (1952) 114 Cal.App.2d, 412, 426–427, 436.) Indeed, these considerations are irrelevant under section 1090. (*People v. Honig* (1996) 48 Cal.App.4th 289, 313–314.)

### C. OFFICIALS SUBJECT TO SECTION 1090 PROHIBITION

Section 1090 has broad application. It does not just apply to members of legislative bodies; it also applies to virtually every person who acts in a fiduciary capacity to a public entity. Thus, board members, officers,

employees, and consultants of a public entity are all subject to section 1090. (See *Thomson v. Call*, *supra*, 38 Ca1.3d at p. 633 [council member]; *City Council v. McKinley* (1978) 80 Cal.App.3d 204 [parks and recreation board member]; *People v. Vallerger* (1977) 67 Cal.App.3d 847 [county assessor]; *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533 [contract city attorney]; 46 Ops.Cal.Atty.Gen. 74 (1965) [consultant].)

### D. PROHIBITION APPLIES TO ALL ASPECTS OF CONTRACT-MAKING PROCESS

Section 1090 only applies to contracts made by public officials in their official capacity. However, section 1090 does not specifically define when contracts are “made.” Courts have construed this concept to encompass *all* conduct by a public official who participates in the making of a contract, including, but not limited to, preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237 [citing *Stigall v. City of Taft*, *supra*, 58 Ca1.2d at pp. 569, 571].)

### E. PROHIBITED FINANCIAL INTEREST MAY BE DIRECT OR INDIRECT

Section 1090 forbids public officers from being “financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” Prohibited financial interests are not limited to express agreements for benefit and need not be proven by direct evidence. (*People v. Honig*, *supra*, 48 Cal.App.4th at pp. 315–316.) Rather, forbidden interests extend to expectations of benefit by express or implied agreement and may be inferred from the circumstances. (*Id.*)

The proscribed financial interest certainly includes any “direct” interest, such as that involved when an officer enters directly into a contract with the body of which he is a member. (*Osburn v. Stone* (1915) 170 Cal. 480; *Berka v. Woodward* (1899) 125 Cal. 119; *County of Shasta v. Moody* (1928) 90 Cal.App. 519.) A classic example of this type of direct interest

occurs when a member of the legislative body owns a business and his business contracts directly with the local agency. A direct interest could also arise when a public official sells or leases his real or personal property directly to the body in which he is a member.

California courts have also consistently voided contracts where a public officer was found to have an “indirect” interest therein. *Thomson v. Call*, *supra*, 38 Ca1.3d at p. 633 provides perhaps the best illustration of an indirect interest. In *Thomson*, a city council member entered into a multi-party agreement with a developer and the city. Under the terms of the agreement, the councilmember sold a parcel of land to the developer who, in turn, was acquiring the land to convey to the city for use as a park and open space. Once the developer conveyed the land to the city, the city issued a use permit to the developer for the construction of a high-rise residential complex on adjacent land. Through the multi-party agreement, the councilmember directly sold his real property to the city, using the corporation as a conduit. This was a single agreement in which the councilmember voted on and personally benefited from. The *Thomson* court held that the councilmember was financially interested in the contract that conveyed land to the city because the developer’s purchase of the councilmember’s land was part of a pre-arranged agreement with the city. (*Thomson v. Call*, *supra*, 38 Ca1.3d at p. 633.)

The courts have also recognized an indirect interest where a public official has not entered (either directly or indirectly) into a contract with the body of which he is a member. In *Moody v. Shuffleton* (1928) 203 Cal. 100, the California Supreme Court held that a conflict existed when printing contracts were awarded to a county supervisor’s son. In that case, a county supervisor sold his printing business to his son and took a promissory note secured by a chattel mortgage on the business. Subsequently, the county awarded a printing contract to the supervisor’s son. The Court reasoned that since the business helped to secure the value of the official’s mortgage, a conflict existed when printing contracts were awarded to the son. (*Moody v. Shuffleton*, *supra*, 203 Cal. at pp. 104–105.)

For purposes of section 1090, it is irrelevant whether the financial interest is

direct or indirect. Instead, the aforementioned cases appear to illustrate that section 1090 is concerned with *any* interest, other than perhaps a remote or minimal interest, that would prevent officials involved from exercising absolute loyalty and undivided allegiance to their agency. (*Stigall v. City of Taft, supra*, 58 Cal.1.2d at p. 569.) The cases also seem to conclude that courts are willing to overlook the fact that the public official is not a party to a contract if the subject agreement results in some form of financial benefit to him.

It is equally important for public officials to realize that where a financial interest is shown, the contract cannot be sustained by showing that it is fair and equitable to the public entity. (*Thomson v. Call, supra*, 38 Cal.1.3d at p. 649.) Moreover, it is immaterial whether the forbidden contract is more advantageous to the public entity than another contract might have been. (*Id.*) The goal is to prevent any involvement in a contract in which an official is financially interested. If a court were to weigh any equitable considerations, the rule would be stripped of its force.

#### F. NEITHER ABSTENTION NOR DISCLOSURE CAN CURE SECTION 1090 VIOLATIONS

Section 1090 does not shield officers from liability simply because they have abstained from voting on a matter in which they have a financial interest. Many courts have concluded that abstention is insufficient to avoid a violation of section 1090. (See *Thomson v. Call, supra*, 38 Cal.1.3d at p. 649 [stating that courts have consistently held that a public officer cannot escape liability for a section 1090 violation merely by abstaining from voting or participating in discussions or negotiations]; *Stigall v. City of Taft, supra*, 58 Cal.1.2d at pp. 570–571; *Hobbs, Wall & Co. v. Moran* (1930) 109 Cal.App. 316, 319.) If a public official were to abstain from the vote it would be inconsequential. Mere membership on the board establishes the presumption that the officer participated in the forbidden transaction or influenced other members of the board. (*Stigall v. City of Taft, supra*, 58 Cal.1.2d at pp. 570–571.)

Nor is it material to the section 1090 analysis that a public official disclosed the

existence of a potential conflict at the outset of the decision-making process. (*Berka v. Woodward* (1899) 125 Cal. 119, 129; *Stockton Plumbing & Supply Co. v. Wheeler, supra*, 68 Cal.App. at 603.) Courts have reasoned that disclosure does not guarantee an absence of influence and, in fact, in some cases may lead to fellow officers favoring an award that might benefit their conflicted colleague. (*Thomson v. Call, supra*, 38 Cal.1.3d at pp. 649–650.)

#### G. STATUTORY EXEMPTIONS TO SECTION 1090 PROHIBITION

##### 1. Remote Interests

The section 1090 prohibition is not absolute. Subdivision (a) of Government Code section 1091 allows a governing board to approve or ratify a contract in which one of its officers has a “remote interest,” provided (1) the conflicted officer discloses his interest to the body, (2) the interest is recorded in the official record, (3) the conflicted officer abstains from influencing or attempting to influence any member of the body in making of the contract, and (4) the conflicted officer does not vote on the contract.<sup>1</sup>

There are fourteen statutorily defined “remote interest” exemptions. The most commonly used exemption applies to public officials who are also an agent or employee of a party that enters into a contract with the public entity on which the official serves. Under subdivision (b) of Government Code section 1091, an otherwise conflicted officer would be exempt from section 1090 if his company, as the contracting party, has ten or more employees and if the officer was an employee or agent of the contracting party at least three years prior to accepting public office. Additionally, the officer must own less than three-percent of the shares of the contracting party, not be an officer or director of the contracting party, and not participate in formulating the bid of the contracting party. (Gov. Code, § 1091, subd. (b)(2).) This exemption often applies where a public agency has had an existing relationship with a private contractor and one of the contractor’s employees becomes a member of the legislative body.

Other exemptions may apply where an official is also an officer or employee of a nonprofit entity exempt from taxation pursuant to the Internal Revenue Code (Gov.

Code, § 1091, subd. (b)(1)) or when the official owned less than three-percent of the shares of a contracting party that is a for-profit corporation (Gov. Code, § 1091, subd. (b)(14)). Public officers and employees should consult agency counsel or seek independent legal advice when determining whether their situation fits within one of the fourteen narrowly tailored exemptions to section 1090.

##### 2. Non-Interests

Government Code section 1091.5 lists those situations where an officer or employee is found to have a “non-interest” in a contract. If an interest is deemed a “non-interest,” then Government Code section 1090 does not apply. Once triggered, section 1091.5 not only allows a legislative body to vote on a contract in which one of its members has a non-interest, but allows the non-interested member to vote on the approval of the subject contract. Even where section 1091.5 ostensibly applies, however, a public official must remain vigilant to the possibility that a conflict may exist under the Political Reform Act.<sup>2</sup>

#### III. REMEDIES AND PENALTIES FOR VIOLATIONS OF GOVERNMENT CODE SECTION 1090

##### A. CONTRACT ENTERED INTO IN VIOLATION OF SECTION 1090 IS DEEMED VOID

A contract made in violation of section 1090 is void as a matter of law. (*Stockton Plumbing & Supply Co. v. Wheeler, supra*, 68 Cal.App. at p. 602; *Thomson v. Call, supra*, 38 Cal.1.3d at p. 646, fn. 15.) Statutory law permits the contract to be voided at the insistence of any party except the interested officer where the officer has any direct or indirect interest therein. (Gov. Code, § 1092.) If the contract is void, the payment of any indebtedness incurred as a result of the prohibited contract is precluded. (Gov. Code, § 1095.)

##### B. CRIMINAL LIABILITY

Where a public official commits fraud or conspires to violate section 1090, he or she may also be subject to criminal sanctions under Government Code section 1097. Possible criminal penalties for violations of



section 1090 include conviction of a felony with a maximum fine of \$1,000 or imprisonment. If the official is convicted, he or she may also be subject to a restitution fine under subdivision (b) of Penal Code section 1202.4, which could total up to \$10,000 if the official is found guilty of a felony. In addition, the official would be forever barred from holding public office in the state. Government Code section 1097 provides:

“Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, including any member of the governing board of a school district, who willfully violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state.”

Section 1097 includes a *mens rea* requirement. Under section 1097, an individual must have “willfully” violated section 1090. “Willfully” in this context means that the official must have purposefully made a contract in which he or she is financially interested. (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1305; *People v. Honig*, *supra*, 48 Cal.App.4th at p. 334.) Although

silent on this point, the statute also appears to have an implied element of “knowledge.” (*Ibid.*) However, an official is said to have “knowingly” violated the conflict of interest statute even when they do not know that there is a reasonable likelihood that the contract may result in a personal financial benefit to him. (*People v. Gnass*, *supra*, 101 Cal.App.4th at p. 1305; *People v. Honig*, *supra*, 48 Cal.App.4th at p. 338.)

Thus, not only must the violation be willful, it must also be made with knowledge that a personal financial benefit is likely to occur. The willfulness requirement focuses on the official’s decision to act, almost without regard to any intent to violate the law, to injure another, or to acquire any advantage. (Pen. Code, § 7, subd. (1).) This element is particularly harsh. And without the implied knowledge requirement, section 1097 would impose strict liability. (See *People v. Simon* (1995) 9 Cal.4th 493, 522.)

#### IV. CONCLUSION

The conflicts of interest laws are a veritable minefield. Public officials should be mindful of the risks and be vigilant against involving themselves, or the agencies they represent, in contracts in which they have a financial interest. The law recognizes that no person is infallible and that no person can faithfully serve two masters. It is for this reason that the law prohibits public officials from entering into contracts that enrich themselves.

#### ENDNOTES

1. Government Code section 1091, subdivision (a) provides:  
  
An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.
2. Even if there is no conflict under Government Code section 1090, public officials, employees, and their legal advisors should consult Government Code section 81000 et seq. (the “Political Reform Act”) since those provisions would supersede any other conflict of interest provisions where an inconsistency existed. (See Government Code section 81013.)

\* Rahsaan J. Tilford is an attorney with Best Best & Krieger LLP and is a member of the firm’s Municipal and Redevelopment Practice Groups.

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Speaker: Darin Snyder, managing partner, O'Melveny & Myers

# Contributions & Conflicts of Interests: Application of Section 84308 May Depend on Contract Process

By Natalie Bocanegra \*

Government Code section 84308 of the Political Reform Act ("PRA") can pose problems for officers of an agency who are also elected officials or candidates receiving contributions. The PRA generally treats conflict of interest disclosure and disqualification separately from campaign financing rules. However, section 84308 combines contribution limit, conflict of interest, and disclosure concepts into one statutory section, creating a potential trap for the unwary officeholder. Adding to this potential pitfall, is the fact that section 84308's application may depend on the contract decision process used by an agency.

The following summarizes the rules provided by Section 84308:

## **Disclosure**

Prior to rendering a decision in the proceeding, the officer must disclose on the record any contribution of more than \$250 received from a party or participant in the preceding 12 months;

A party to a proceeding must also disclose these types of contributions made to the officer in the preceding 12 months.

## **Disqualification**

The officer is prohibited from making, participating in making or influencing a decision in the proceeding if the officer did receive such a contribution. However, return of the contribution within 30 days will permit participation.

## **Contribution Prohibitions**

Neither a party nor a participant to a proceeding pending before the official's agency may contribute more than \$250 to any

officer of the agency during the proceeding or for three months following the final decision on the proceeding;

An officer of an agency may not accept, solicit or direct a contribution of more than \$250 from a party or participant (or from an agent of either) in a proceeding pending before the agency and for three months following the final decision.

In light of these rules, before assuming his or her position with the agency, an officer subject to section 84308 should inventory past contributions to determine whether he or she must disclose a contribution and abstain from participation in a decision or return the contribution itself. An officer may participate in the proceeding if he or she returns a contribution in excess of the threshold within 30 days from the time he or she knows, or should have known, about the contribution and a pending proceeding. Such actions will allow the officer to comply with the section's disclosure and disqualification rules.

The more vexing aspect of section 84308, however, is the prohibition against certain contributions of more than \$250 during the pendency of, and after, the proceeding. In contrast to the exception to disqualification (allowing return of a contribution), there is no provision which allows an officer to "undo" the acceptance, solicitation, or direction of a prohibited contribution during this period.

For officers involved with campaigns then, identifying from the outset when a particular contribution is prohibited is critical, since the acceptance of a contribution may trigger a violation of section 84308. Thus, this article focuses on the rules relating to the contribution prohibition, using contract matters to illustrate the application of section 84308.

## **PROHIBITION AGAINST ACCEPTING, SOLICITING, OR DIRECTING CONTRIBUTIONS DURING THE PROCEEDING AND FOR THREE MONTHS AFTER**

The contribution prohibition applies when an officer accepts a campaign contribution into his or her committee account or solicits contributions on behalf of other candidates or ballot measure committees in federal, state, or local elections.<sup>1</sup> For purposes of section 84308, an officer "solicits" a contribution only if he or she knows or has reason to know that the person whom he or she is asking for a contribution is a party or participant, or their agent<sup>2</sup> and:

The officer personally requests the contribution either orally or in writing;<sup>3</sup> or

The officer's agent requests the contribution for the officer, with the officer's knowledge.<sup>4</sup>

By comparison, a request is not a solicitation where an officer makes a request in a mass mailing sent to members of the public, at a public gathering, in a newspaper, or on radio or television or other mass media.<sup>5</sup> Additionally, the officer does not solicit a contribution simply because the letterhead containing the request includes his or her name in addition to others.<sup>6</sup>

An officer "directs" a contribution if he or she acts as the agent of another candidate or committee, other than his or her own controlled committee, in accepting a contribution on behalf of the other candidate or committee.<sup>7</sup>

## **"OFFICERS" OF AN "AGENCY"**

Section 84308 applies to all elected and appointed "officers" of an "agency." The term

“officer” is broad and includes any elected or appointed officer of an agency or their alternate as well as a candidate for elective office. While the term “officer” is broad, the term “agency” is narrow and *excludes* “the courts or any agency in the judicial branch of government, local governmental agencies whose members are directly elected by the voters, the State Legislature, the Board of Equalization, or constitutional officers.”<sup>8</sup> For example, an elected official serving as a member of a city council or a county board of supervisors is not subject to this section, unless the elected official acts as a voting member of another agency. As a result, in practice, the section usually applies to appointed members of local boards and commissions.

**Example:** Ramona Gutierrez is a city council member and member of the Regional Transportation Authority. Because the Transportation Authority is a joint powers authority composed of members representing several cities as well as members representing the county, each appointed by their respective jurisdictions, this agency is subject to section 84308. Even though Ms. Gutierrez is exempt from section 84308 while she sits as a city council member, she is subject to the section as a member of the Transportation Authority.

### “PARTIES” & “PARTICIPANTS”

Section 84308 distinguishes between a “party” and a “participant.” A “party” to the proceeding is the person who files an application for or is the subject of the proceeding.<sup>9</sup> A “participant,” on the other hand, is a person who is not a “party,” but who actively supports or opposes a particular decision in a proceeding and who has a “financial interest” in the decision.<sup>10</sup>

**Participant Test, Part 1:** A person actively supports or opposes a decision if the person lobbies agency officers or employees, testifies before the agency, or otherwise acts to influence officers of the agency. However, a person will not qualify as a participant if they make communications to the public outside of the proceedings before the agency. For example, it is unlikely that there are any “parties” to the proceedings at the stage where a board or commission is reviewing or issuing a RFP, however there may be “participants” interested in influencing contract specifications.<sup>11</sup>

**Participant Test, Part 2:** Section 84308 employs the test for identifying a financial interest under the Political Reform Act (commencing with section 87100)<sup>12</sup> to determine whether a person has a “financial interest” in a decision of the proceeding, thereby becoming a “participant.” (However, while the test is borrowed from the Political Reform Act, campaign contributions are not subject to the conflict of interest rules.)

The first step of the test is identifying a potential participant’s economic interests. These can include real property, sources of income or gifts, business investments, or businesses in which the person is an employee or holds one of several specified high-level positions.<sup>13</sup> A person will have a financial interest in a decision if it is reasonably foreseeable that the decision will financially affect the person’s economic interest in a significant enough manner based on materiality standards set by the Fair Political Practices Commission (“FPPC”).

**Example:** Apex Design Firm has testified before the Transportation Authority board, stating that it supports a proposed Request for Proposals (“RFP”) and plans to submit a proposal for the six-month, \$35,000 contract which is the subject of the RFP. Apex is one of three firms specializing in the services requested. Applying the conflict of interest rules, Apex is indirectly involved in the RFP decision. Therefore, Apex is financially interested in the decision if it is reasonably foreseeable that the RFP decision will increase or decrease Apex’s gross revenues for a fiscal year in the amount of \$20,000 or more. Because it is reasonably foreseeable that Apex will be awarded the contract which will increase Apex’s gross revenues by \$20,000 or more within a fiscal year, Apex is considered a participant under section 84308.

All prohibitions and disclosures under section 84308 apply to the majority shareholder of a closed corporation, when that corporation is a party or participant in a proceeding before an agency.<sup>14</sup>

It is important to remember that the statute also covers an agent of a party or participant under some circumstances.

**Example:** John Smith provides contract procurement services to his client Ace

Planners Inc. and represents Ace in a contract proceeding pending before the board of the Transportation Authority. Since Mr. Smith is an agent of participant Ace, Ms. Gutierrez may not accept a contribution of more than \$250 from Mr. Smith.

### “PROCEEDING” FOR PURPOSES OF SECTION 84308

Section 84308 covers more than contract proceedings. A “proceeding” includes any proceeding to “grant, deny, revoke, restrict, or modify a license, permit or other entitlement for use.”<sup>15</sup> Proceedings involving contracts are expressly subject to section 84308, except competitively bid, labor, or personal employment contracts.<sup>16</sup>

A proceeding is considered “pending before” an agency when an application is filed, the proceeding begins, or the issue is otherwise submitted to the agency for a determination or action.<sup>17</sup> However, the proceeding must be one where the law requires the officers of the agency to make a decision or otherwise submit the matter to the officers for their decision.<sup>18</sup> Purely ministerial matters are not proceedings.<sup>19</sup>

One potential pitfall is that a contract proceeding may be “pending” as early as consideration of the specifications for a RFP. This is because the RFP is an integral part of the contract since it sets the foundation for the contractual relationship.<sup>20</sup> Specifically, where the agency has a direct and significant effect on persons intending to bid on the contract, the decision to approve the contents of a RFP is a “proceeding pending before an agency.”<sup>21</sup>

**Example:** The Transportation Authority board is deciding on the specifications of a RFP. Peeples Transportation, a consulting firm specializing in design and construction, previously testified before the board of the Transportation Authority regarding several proposed provisions of the RFP, explaining that it will submit a proposal. Peeples offers to contribute \$500 to Ramona Gutierrez’ campaign. Ms. Gutierrez is permitted to accept this contribution because Section 84308 does not apply at this point.

**The Contract Process:** Although a proceeding to decide RFP specifications may



trigger section 84308, this section is not applicable where the governing board of an agency does not participate in the review of a proposal submitted to staff and where the board makes no decision regarding the proposal.<sup>22</sup> Consequently, whether section 84308 and its contribution prohibition apply will depend on the contract process used by the agency and participation of the board members in the proposal's review.

For example, review by a committee of a submitted proposal to assess whether it meets RFP specifications or to rank it among others, will constitute a pending proceeding, if members of the governing board or the full board constitute the reviewing committee.<sup>23</sup>

**Example:** Cones & Lane, another transportation planning firm, submits a proposal in response to the RFP issued by the Transportation Authority. Transportation Authority staff are evaluating and ranking the proposal along with others. Cones & Lane offers to contribute \$500 to Ramona Gutierrez. Since the board is not participating in this initial assessment and does not know who the bidders are, Ms. Gutierrez may accept this contribution because section 84308 does not apply at this point.

Clearly, the ultimate awarding of the contract by the board is also a proceeding subject to section 84308. In particular, if an agency's board has discretion as to its selection, section 84308 applies to the proceeding which award a contract.<sup>24</sup>

### “KNOWS OR HAS REASON TO KNOW”

The contribution prohibition will only apply if the board member has certain knowledge of the proceeding and the contribution. The prohibition applies if the

officer knows or has reason to know that the participant has a financial interest in a pending proceeding.<sup>25</sup> Aside from having actual knowledge of the proceeding, an officer knows or should have known about a proceeding before his or her agency if the officer received notice of the proceeding.<sup>26</sup> Notice includes receipt of an agenda or docket identifying the proceeding and the party or other persons affected by name. As a result, a significant issue is whether a board member has reason to know of a pending proceeding that is not specifically described in an agenda or other notice.

**Example:** Transportation Authority staff researched and made recommendations regarding potential contract matters up for consideration at an upcoming board meeting. Since the agenda distributed to board members lists the proposed matters by name, Ramona Gutierrez “knows or should have known” that each matter may constitute a proceeding before the agency.

In sum, agencies subject to section 84308 in the practice of contracting should take heed—they may wish to structure the agency's contract process, if appropriate, to allow staff to conduct much of the preliminary assessment before the board reviews the matter.

In addition, an agency may wish to consider the process used to communicate information regarding pending proceedings to the board members. Having such a policy in place can help eliminate uncertainty as to a member's knowledge.

Finally, because section 84308 merges contribution, conflict of interest, and disclosure rules and applies them to actions of appointed members of boards or commissions, any member who is actively campaigning should consult the section.

### ENDNOTES

1. Govt. Code, § 84308, subd. (a)(6).
2. Cal. Code Regs., tit 2., § 18438.6(c).
3. Cal. Code Regs. § 18438.6, subd. (c)(1).
4. Cal. Code Regs. § 18438.6, subd. (c)(2).
5. Cal. Code Regs. § 18438.6, subd. (d).
6. *Ibid.*
7. Cal. Code Regs., tit 2., § 18438.6, subd. (e).
8. Govt. Code, § 84308, subd. (a)(3).
9. Govt. Code, § 84308, subd. (a)(1).
10. Govt. Code, § 84308, subd. (a)(2).
11. *Alperin* FPPC Advice Letter, No. A-96-083.
12. Govt. Code, §§ 82028 and 82030.
13. Cal. Govt. Code, § 87103.
14. Cal. Govt. Code, § 84304, subd. (d).
15. Govt. Code, § 84308, subd. (a)(5); Cal. Code Regs., tit. 2, § 18438.2, subd. (a).
16. *Ibid.*
17. Cal. Code Regs., tit 2., § 18438.2, subd. (b)(1).
18. Cal. Code Regs., tit 2., § 18438.2, subd. (b)(2).
19. Cal. Code Regs., tit 2., § 18438.2, subd. (b).
20. *Brue* FPPC Advice Letter, No. I-93-384.
21. *Greenwald* FPPC Advice Letter, No. I-93-220.
22. *Ibid.*
23. *Smart* FPPC Advice Letter, No. I-92-249.
24. *Greenwald*, *supra*.
25. Govt. Code, § 84308, subd. (b).
26. Cal. Code, Regs., tit. 2, § 18438.7.

\* Natalie Bocanegra is an attorney with Kaufman Downing LLP specializing in campaign finance and governmental ethics law.

# Clara Slifkin

## Honored as the 2006 Public Lawyer of the Year



The Public Law Section announced that Clara Slifkin was selected as the 2006 Public Lawyer of the Year. The award was presented by Chief Justice Ronald George during the State Bar of California 2006 Annual Meeting in October 2006.

Ms. Slifkin has devoted her entire legal career to serving the public interest. Until her recent appointment as Administrative Law Judge, she served 17 years as Deputy Attorney General in the Land Law and Business and Tax Sections of the California Department of Justice. There, she litigated public policy matters and advised state agencies such as the California Coastal Commission, Santa Monica Mountains Conservancy, State Board of Equalization, Department of Real Estate, and Department of Insurance. She argued before the California Supreme Court and won a victory in *Beatrice Co. v. State Bd. of Equalization* (1993) 6 Ca1.4th 767 [the assumption by the subsidiary of a parent corporation's liabilities constituted consideration for the transferred property which subjected the transaction to taxation.] Clara also played a leading role in the Attorney General's \$73 million settlement with Montrose Chemical Corporation to clean up DDT and PCBs on the Palos Verdes shelf.

Prior to her career as a prosecutor, Clara served 12 years as Deputy Public Defender in Los Angeles County, where she represented indigent criminal defendants. She also served for two years as Legislative Analyst for the Los Angeles City Council, where she drafted and analyzed municipal legislation affecting every

facet of urban life.

Aside from the practice of public law, Clara has been a leader in improving the legal profession at The State Bar of California. The first government attorney elected to its Board of Governors from District 7 (Los Angeles), Clara brought recognition to and gave government/ public lawyers a voice in the operation of the State Bar. She was Vice President and member of the State Bar's Board of Governors at a time when the unified Bar was restructured. Former State Bar President Jim Towery appointed Clara as Chair of the Task Force on Government Lawyers. Former Chief Justice Malcolm Lucas appointed her to the Judicial Council's Advisory Committee on Judicial Performance and Procedures and the Committee to Save the Unified Bar. In addition, Clara was former Chair of the Public Law Section, Council of Sections, Future Planning Committee, and was Vice Chair of the Commission on Corrections. In all these capacities, she brought the unique perspective of the public lawyer in shaping a Bar that is more accountable to the public trust and better serves the members of our profession.

Ever committed to public service, Clara currently serves as Vice President and Scholarship Committee Chair of the Board of the Foundation of the State Bar, which distributes scholarships to law students and grants to nonprofit organizations, courts, and bar associations for law-related projects. She is also Board Secretary of the Center for Civic

Education, which promotes civic education in the schools, encourages students' commitment to fundamental values and principles of constitutional democracy, including individual rights, the common good and the rule of law.

Clara was further active in the American Bar Association's Public Lawyer Section, where she planned programs for government attorneys.

Accordingly, Clara is the very model of an outstanding public lawyer, who has well served the citizens of California and the members of our profession.

### PAST HONOREES

Each year the Public Law Section honors a public lawyer selected by the Public Law Section Executive Committee from nominations sent in by members of the Section, the State Bar, and the public at large. The following individuals exemplify the outstanding work that public lawyers perform every day.

2005: Manuela Albuquerque  
2004: Roderick Watson  
2003: Ariel Pierre Calonne  
2002: Herschel Elkins  
2001: Jayne W. Williams  
2000: Prudence Kay Poppink  
1999: JoAnne Speers  
1998: Peter Belton  
1997: Andrew Gustafson

# Re Public Lawyer of the Year 2006:

## *Remarks of Chief Justice*

### *Ronald M. George*



Good afternoon. It is a pleasure once again to join you in this celebration of outstanding members of the legal profession. Having served my entire legal career in public service, I am particularly pleased to be with you to present the Public Lawyer of the Year award. This award recognizes individuals who exemplify the role of lawyers who use their professional skills to advance the public interest and protect the rights of citizens. This year's honoree, Clara Slifkin, has spent her legal career spanning more than three decades in service to the people of California.

Being honored by one's peers is a unique affirmation of achievement in one's profession. As the recipient of the State Bar's 2006 Public Lawyer of the Year award, Ms. Slifkin joins a distinguished group of public advocates who have brought their exceptional legal and intellectual skills to bear for the common good.

During her public law career, Ms. Slifkin has represented the interests of all Californians at every level of court. As a deputy public defender in Los Angeles County for 12 years, she represented indigent criminal defendants in more than 40 jury trials. Her contribution in the public sphere then moved to the state level as a deputy attorney general with the California Department of Justice, where she represented the people for 16 years in public policy matters relating to land use, environmental law, and business. Her professional achievements have included effective representation of the State Board of Equalization before the Supreme Court, and numerous appearances before the Court of Appeal on behalf of the California Coastal Commission and other state agencies.

The experience and sustained commitment of public lawyers, who, according to the American Bar Association, constitute one-sixth of all legal professionals in the United States, are central to building public trust and confidence in the justice system, and government in general. Our expectations about

those who represent government are high—as they should be. We are fortunate that so many individuals—who choose to pursue and remain in public law careers—excel in meeting the highest standards of practice on behalf of both their individual clients and society as a whole.

As a long-time, active leader in the State Bar, Ms. Slifkin also has worked to strengthen and contribute to the development of the legal profession. The first government attorney elected to the bar's Board of Governors from District 7 in Los Angeles, she served as vice-president of that organization when the unified bar was restructured, bringing the important perspective of the public lawyer to the development of the governance process for the legal profession.

She also has brought her experience as a public lawyer to her service on several other State Bar committees, serving as chair of the Future Planning Committee, the Task Force on the Role of Volunteer Groups, the Government Lawyers Task Force, the Council of Section Chairs, and the Public Law Section—which plays an important role in developing resources to assist public lawyers.

At the national level, Ms. Slifkin's strong leadership in promoting public lawyers' participation in bar association activities was recognized by the Government and Public Law Sectors Division of the American Bar Association when she was appointed to serve on its Leadership Planning Committee.

Clara Slifkin's passion for public service extends beyond the present to investing in future generations. She is a vice-president of the board of the Foundation of the State Bar, which, as you probably know, distributes grants to nonprofit organizations, courts, and bar associations for law-related projects in partnership with the California Judicial Council. She also chairs the foundation's Scholarship Committee. This year in Monterey, the committee will award some

\$191,500 to 40 law students to encourage them and help them reach their full potential in the legal profession.

Her motivation to serve the public interest and her commitment to action also has reached beyond California and the legal field. Serving on the executive committee and as secretary of the Center for Civic Education, an organization dedicated to promoting exemplary programs in civic education in the United States and other nations, she has taken a front-line role in ensuring that the role of government, the importance of community interests, and the fundamental democratic rights of individual citizens are understood at home and abroad.

Earlier this year, Ms. Slifkin stepped to the other side of the bar when she was appointed as an administrative law judge. In this capacity, she continues to use her public law expertise, acting as a judge or mediator in special education hearings to determine whether a proposed individual educational program—for a child with special needs—qualifies as free appropriate public education under federal law and the California Government Code.

As many of you here today know, choosing to become a public lawyer, although not the most rewarding career choice monetarily, can provide an incalculable sense of personal satisfaction and connection with those we serve. The value of Ms. Slifkin's many contributions to public practice, her dedication to making the experienced voice of her profession heard, and her commitment to the administration of justice and the public good all make her a most deserving recipient of this year's Public Lawyer of the Year award.

Please join me in congratulating her on this well-deserved recognition and thanking her for her service to the people of California.

# Remarks of Clara L. Slifkin

## Public Lawyer of the Year

Award Ceremony, October 6, 2006

Through his public law career, I have had the opportunity to appear in front of and get to know Chief Justice Ronald George as a trial judge and as a Justice on the Court of Appeal and on the Supreme Court. I am very happy that the Chief Justice had the time to speak this evening despite his very hectic schedule at the State Bar's Annual Meeting. His very kind remarks about me are particularly meaningful. I would also like to thank the Public Law Section and its officers for this great honor. Finally, I would like to thank my children, Matthew and Lauren, my family, my friends and my colleagues for being here today.

Theodore Roosevelt said, "*The best prize life offers is the chance to work hard, at work worth doing.*" As a public lawyer, I have had the opportunity to do hard work that has been meaningful. I have been very fortunate to have found and traveled this path.

There is no higher calling than public service. Public lawyers are sworn to protect the Constitution; this oath requires us to be the guardians of our democratic ideals. In our representation of public entities, we defend legal principles and the rule of law. Public lawyers have the opportunity to experience the practice of law without having the business development obligations that our colleagues in private practice experience. We work for government entities that have been at the forefront of hiring women and minorities.

Ethical issues are of particular concern to public lawyers, because courts have articulated higher ethical responsibilities for public lawyers. We serve as national leaders in re-dedicating our profession to the highest standards of professional conduct, competence, fairness, social justice, diligence and civility.

Since receiving my Juris Doctorate degree from Loyola Law School, Los Angeles in 1975, I have dedicated my legal career to serving the public interest. As a government lawyer, I have had the opportunity to do meaningful work

that has been valuable to: the State Agencies I served for 17 years as Deputy Attorney General; the indigent criminal defendants I served for 12 years as a Deputy Public Defender; and the Los Angeles City Council I served for two years as an Advisor and Legislative Analyst. Thus, public service has given me an opportunity to formulate public policy in many different arenas.

Recently, I was honored to be appointed as an Administrative Law Judge, in the Office of Administrative Hearings, Special Education Division. Special Education hearings focus on whether a proposed individual educational program for a child with special needs, constitutes a free appropriate public education pursuant to the Federal Individuals with Disabilities Education Act and the California Education Code.

During my career, I have worked to improve the legal profession and to enhance the stature of public lawyers, through volunteer work. I served as Vice President and a member of the State Bar's Board of Governors, at a critical time when the unified Bar was restructured. As a member of the Board, as Chair of the Future Planning Committee and Task Force on the Role of Volunteer Groups, I helped improve the State Bar's accountability and communication with its members and the public. Prior to this, I gave public lawyers a voice when I served as Chair of the Council of Section Chairs, Public Law Section, Government Lawyers' Task Force and Vice Chair of the Commission on Corrections. Former Chief Justice Malcolm Lucas appointed me to the Judicial Council's Advisory Committee on Judicial Performance and Procedures. In all these capacities, I brought the unique perspective of the public lawyer in shaping our Bar to be more accountable to the public and its members.

Twice a year as a member of the Board of Governors, I spoke at the ceremony for lawyers who passed the Bar Exam, as they

commenced their new career. I informed them that the State Bar was created in 1927 "to enhance the administration of justice, create consistency in protecting the public, and advance the profession to higher noble goals." At the end of my speech I would talk about the nobility of public service, urging new admittees to find work that they adore and work hard to make a difference. The lawyers that I have worked and served with on the State Bar Board of Governor's, committees, boards and commissions, know that we have worked hard; we have made a difference.

When I first began my volunteer work with the State Bar, there were very few government lawyers involved. Presently, former government lawyers are in powerful positions as members of the United States Supreme Court, Congress, the California Supreme Court, the American Bar Association, the State Bar Board of Governors, and state legislatures.

As a government attorney, I have had the opportunity to work hard at work worth doing. During my long career in public service, because of the opportunity I have had to address cutting edge issues, I have affected legal precedence and public policy. I have argued in federal, state, and administrative courts.

I have learned from government practice and my colleagues that being a good lawyer means: using common sense as well as the law to handle problems; being civil to those who are uncivil; recognizing that the principles upon which this country was founded, apply not just to the best of us, but to all of us; and accepting the responsibility to represent the justice system at your very best.

I am very grateful to the Public Law Section for this honor. I am happy to have worked with many of you who are here today. My life is richer because so many of you have been a part of my life and have become such good friends.



# The Public Law Section

## of the State Bar of California

wishes to extend its grateful appreciation to the following  
sponsors of the 2006 Public Lawyer of the Year Award and  
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# 2007 PUBLIC LAWYER OF THE YEAR

Do you know a public law practitioner who deserves special recognition because of outstanding service to the public?

If so, that person could be the recipient of the Public Law Section's "Public Lawyer of the Year" award.

Each year the Public Law Section honors a public lawyer selected by the Public Law Section Executive Committee from nominations sent in by members of the Public Law Section, the State Bar, and the public at large.

For the award, the Public Law Section Executive Committee is looking for an active, practicing public lawyer who meets the following criteria:

1. At least 5 years of recent, continuous practice in Public Law.
2. An exemplary record and reputation in the legal community.
3. The highest ethical standards.

Not necessarily a political figure or headliner, the ideal recipient would be a Public Law practitioner who has excelled in his or her public service without fanfare. The Public Law Section Executive Committee supports the goal of diversity in the membership and leadership of the State Bar. Accordingly, the Executive Committee will ensure that the achievements of all outstanding members of the Bar who practice public law are carefully considered.

Nominations are now being accepted. The 2007 Public Lawyer of the Year award will be presented at the State Bar Annual Meeting in Anaheim on September 28, 2007.

Send nominations, no later than 12:00 midnight, April 1, 2007, to:

Thomas Pye, Public Law Section, State Bar of California, 180 Howard Street, San Francisco, CA 94105-1639

*To nominate an individual for this award, fill out the official nomination form below.*

*Add attachments, if necessary.*

**Nominee's Name:**

**Years of Public Law Practice:**

**Place of Business:**

**Brief statement why Nominee deserves recognition:**

**Nominator's Name:**

**Telephone Number:**

**Address:**

# A Message from the Chair

By Betty Ann Downing, Esq.

In this, my first message as Chair of the Public Law Section, my top priority is to thank my predecessor Terence Boga for sharing his immense talents with me as I tried to prepare to take on this responsibility. Public Law Section members should know that Terence provided the idea for and served as the driving force behind our new brochure, "How Government Works, An Introduction to Local and Regional Public Agencies in California." This informative brochure, being distributed to public libraries and other locations throughout California, concisely demystifies the organizational structure and responsibilities of public agencies for the general public.

Our Executive Committee welcomed new members Justine Block, Jana DuBois and Rich Miadich. Executive Committee members bring diverse practice backgrounds to our efforts and work in/for state agencies, local government agencies, courts, special districts, and law firms. We invite you to apply to become an Executive Committee member for the terms that begin in Fall 2007. Applications are available on the State Bar website ([www.calbar.org](http://www.calbar.org)). If you would like to know more about what it means to serve as a member of the Executive Committee, please do contact me ([badowning@kaufmandowning.com](mailto:badowning@kaufmandowning.com)).

The Public Law Section is once again sponsoring several interesting programs at the Winter Section Education Institute, to be held in Berkeley from January 19 through January 21, 2007. The Education Institute provides a wide range of programs designed to help attorneys meet the January 31, 2007 compliance deadline. If you can't make it to Berkeley, check out the on-line MCLE programs available around the clock through our Public Law Section website.



## A Message from the Immediate Past Chair

By Terence R. Boga

My primary goal for my tenure as Chair was to increase the Public Law Section's visibility among the general public. To that end, in September 2005, I proposed a special project to the Executive Committee. The project was to produce a consumer pamphlet that would provide a broad-strokes picture of the governance and functions of different public agencies, as well as a synopsis of the most significant government accountability laws. I am pleased to report that the Executive Committee enthusiastically supported my proposal. I am even more pleased to announce the newest addition to the State Bar's consumer pamphlet library: *How Government Works: An Introduction to Local and Regional Public Agencies in California*.

*How Government Works* consists of two parts. Part I discusses cities, school districts, counties, redevelopment agencies and air quality management districts. Part II summarizes the Public Records Act, the Brown Act and the Political Reform Act. I wish to give special recognition to the following Executive Committee members for authoring these pieces: Natalie Bocanegra, Jacqueline Carey-Wilson, Stephen Deitsch, Leslie Gallagher, Alan Hersh, Jolie Houston, A. John Olvera, and Charles Williams. I also wish to thank Betty Ann Downing, the new Chair, for her invaluable editorial assistance. Finally, I wish to acknowledge the Foundation of the State Bar for financially supporting this consumer pamphlet.

Copies of *How Government Works* have been sent to nearly 900 public libraries in the state. Additionally, each Public Law Section member will shortly receive a copy in the mail. I hope that all readers, lay person and lawyer alike, will find it informative.

In closing, I applaud all of the Executive Committee members, advisors and State Bar staff for their service during the 2005-2006 term. I am honored to have been part of such a fine team.

# Join The Public Law Section

Use this application form. If you are already a member, give it to a partner, associate, or friend.  
Membership will help you **SERVE YOUR CLIENTS** and **SERVE YOURSELF** now and in the future.

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I have enclosed my check for \$65\* payable to the State Bar of California for a one-year membership in the Public Law Section. (Your canceled check is acknowledgement of membership.)

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